This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 9/22/04.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)		
	)		
Lisa Lill,	)		
Complainant	)		
	)	**CHARGE NO.:**	**1999 CF 1682**
and	)	**EEOC NO.:**	**21B 990980**
	)	**ALS NO.:**	**11115**
Panduit Corporation,	)		
Respondent	)		

RECOMMENDED ORDER AND DECISION

This matter came before me on March 12 and 13, 2001 for a public hearing on the complaint filed by the Illinois Department of Human Rights on behalf of Complainant on December 8, 1999. The post-hearing briefs and replies of both parties were duly filed and the record is now complete.

Statement of the Case

The complaint in this case was filed on Complainant's behalf by the Illinois Department of Human Rights ("Department") on December 8, 1999. Respondent filed its verified answer on January 11, 2000. A scheduling order was entered on February 9, 2000, followed by a period of discovery. The joint pre-hearing memorandum was filed on November 3, 2000 and, in an order entered on November 13, 2000, the public hearing was scheduled to begin on March 12, 2001 as noted above. The matter is now ready for decision.

Findings of Fact

The following facts are based upon the record of the public hearing in this matter. Factual assertions made at the public hearing, but not addressed in these findings, were determined to be unproven by a preponderance of the evidence or were otherwise immaterial to

the issues at hand. Numbers one to 17 are those facts that were classified as "uncontested" by the parties in their joint pre-hearing memorandum, although they may be slightly edited here; these items are marked by an asterisk (*). Throughout this recommended order, citations to the public hearing transcript are indicated as "Tr. ###." Complainant's exhibits admitted into evidence are denoted "CX-#" and Respondent's exhibits are denoted "RX-#."

1. Complainant Lisa Lill filed Charge No. 1999CF1682 with the Department of Human Rights on December 30, 1998, alleging that she had suffered sexual harassment and retaliation as prohibited by Section 6-101(A) of the Illinois Human Rights Act. *

2. The Department dismissed Complainant's allegation of sexual harassment as lacking substantial evidence. *

3. At the time of the incidents alleged, Respondent was an employer within the meaning of the Act. *

4. On or about July, 1997, Respondent hired Complainant as a packager. *

5. On September 8, 1998, Complainant met with Human Resources Supervisor Patricia Burke; on September 24, 1998, Complainant met with Operations Manager Trevor Olsen; and, on September 25, 1998, Complainant met with Vice President Jack Tison. *

6. Complainant's complaints on September 8, 1998, September 24, 1998 and September 25, 1998 concerned her foreman, William VanderVeen. *

7. On October 13, 1998, Patricia Burke and Trevor Olsen told Complainant that they received an anonymous tip that Lisa Lill and coworker Sherri Bundy were going to smoke marijuana while they were out to lunch. *

8. Complainant denied using marijuana during her lunch break. *

9. Burke and Olsen told Complainant and Bundy that they must take a drug test or be terminated from employment. *

10. Complainant and Bundy each took a drug test on October 13, 1998. *

11. The results of Complainant's drug test were "negative." *

` 12. Sherri Bundy's drug test came back negative for cannabis. *

13. Jason Pekelder, an employee at Panduit, is alleged to be the source of the anonymous tip. *

14. Pekelder is alleged to have made this anonymous tip to foreman William VanderVeen. *

15. Jason Pekelder is the former boyfriend of Complainant. *

16. On October 20, 1998, Respondent discharged Complainant from her employment. *

17. Complainant asked Patricia Burke for a copy of her drug test results on October 20, 1998. *

18. On October 13, 1998, Complainant admitted to Patricia Burke that she smoked marijuana at 5:00 a.m. that morning before coming to work. Tr. 227.

19. On October 13, 1998, Complainant admitted to Tammy Shields that she smoked marijuana at 5:00 a.m. that morning and she had at least two "hits" from a bowl of marijuana during lunch, although the latter was not even enough to get a "buzz." Tr. 275.

20. Respondent's general counsel, Gerald Caveney, made the decision to discharge Complainant from her employment with Respondent. Tr. 299.

Conclusions of Law

1. Complainant is an "aggrieved party" and Respondent is an "employer" as

those terms are defined by the Illinois Human Rights Act, 775 ILCS 5/1-103(B) and 5/2-101(B) respectively.

2. The Commission has jurisdiction over the parties and the subject matter of this action.

3. Respondent was Complainant's employer for all periods of time relevant to the complaint.

4. Complainant did not establish by a preponderance of the evidence that Respondent discharged her in retaliation for her opposition to sexual harassment.

5. The charge and complaint in this matter should be dismissed with prejudice.

Discussion

The complaint in this case alleges "(t)hat Respondent discharged Complainant in retaliation for her opposition to unlawful sexual harassment, in violation of Section 6-101(A) of the (Illinois Human Rights) Act." Complaint, Paragraph Nine. When there is no direct evidence of unlawful retaliation by a respondent, as is true for this case, it is usual for the analysis of the evidence to proceed under the process described in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This process requires the complainant to first establish a *prima facie* case, which can then be rebutted by the articulation (not proof) by the respondent of a lawful reason for the action taken. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). If this is done successfully, the complainant must then establish by a preponderance of the evidence that the reason advanced by respondent is merely a pretext for the alleged unlawful conduct. This method of proof has been adopted by the Commission and approved for use here by the Illinois Supreme Court. Zaderaka v. Illinois Human Rights Comm'n, 131 Ill.2d 172, 178, 545 N.E.2d 684, 137 Ill.Dec. 31 (1989).

The standard for establishing a *prima facie* case of retaliation allegation is that the complainant must show that 1) the Complainant engaged in a protected activity; 2) the Respondent committed an adverse act against her; and, 3) there is a causal nexus between the protected activity and the adverse act. Maye v. Illinois Human Rights Comm'n, 224 Ill.App.3d 353, 360, 586 N.E.2d 550, 166 Ill.Dec. 592 (1st Dist. 1991). The *prima facie* case is easily established. Complainant approached managerial personnel of Respondent with allegations about offensive remarks made by her supervisor, Walt VanderVeen. Upon investigation, the supervisor admitted making at least one of the remarks as alleged. He was required to attend remedial classes to prevent a recurrence of such incidents (the classes were dubbed "Lill classes" by the other employees under his supervision. Tr. 285.) The Department determined there was not substantial evidence to support a complaint of sexual harassment under the Human Rights Act for the supervisor's conduct, but Complainant's action in bringing this to the attention of management is still a protected activity. The first element of the *prima facie* case is satisfied.

As to the second element, there can be no dispute that Respondent committed an adverse act against Complainant in that she was discharged from her employment on October 20, 1998. Finally, with regard to the third element, it is troubling when the alleged retaliatory adverse act occurs within a short time after the protected activity asserted by the complainant. The Illinois Appellate Court has found that even a 90-day gap between the protected activity and the alleged retaliatory action is suspicious and can satisfy this element of the *prima facie* case. Maye at 362. Here, Complainant met with management three times in September, 1998 regarding the offensive conduct of her supervisor, the last being on September 25, 1998, only 18 days prior to the beginning of the series of events leading to her discharge. All three elements of the *prima facie* case for retaliatory discharge are satisfied.

In this matter, the articulated reason for the discharge of Complainant is that her admitted drug use constituted a danger to herself and others in the workplace. This issue was raised on October 13, 1998 when Walt VanderVeen, by then Complainant's former supervisor, told Patricia Burke of Human Resources that Jason Pakelder, Complainant's former boyfriend, reported to him that Complainant and a co-worker, Sherry Ann Bundy planned to smoke marijuana during lunch. Tr. 222-3. Later that afternoon, Ms. Burke ordered the two women to submit to a drug-screening test, which they took that same afternoon. Tr. 226. Complainant's test result was negative for marijuana and other substances included in the screening test (Ms. Bundy did test positive for cocaine (only), but that is irrelevant to this matter). However, both Ms. Burke and Tammy Shield, the security guard who drove them to the clinic where the drug screens were taken, credibly testified to incriminating statements made by the women regarding their drug history and drug use on October 13th. *See* Conclusions of Fact, Numbers 18 and 19.

In summary, Complainant admitted that she used marijuana on occasion and had in fact used it both during the early morning hours of October 13th prior to coming to work and at lunch that day. During the public hearing, she denied making these statements. Her denials are not credible when the entirety of her testimony is considered. However, because the drug screen came back negative, she is attempting to distance herself from the heart-felt admissions against interest she made on October 13, 1998. No evidence was presented at the public hearing regarding the reliability and rate of error of the particular drug screen used in this matter. Nor was it established that whatever Complainant and Ms. Bundy smoked was indeed marijuana, or a substance with sufficient marijuana content to register on a screening test. But by making the voluntary statements to management personnel, Complainant demonstrated that she was willing

to jeopardize the safety of herself and others by ingesting a dangerous substance (or what she believed to be a dangerous substance) just prior to going to work and even while at work.

Complainant further contends that any action taken by Respondent in response to information supplied by Jason Pakelder and Walt VanderVeen is suspect because of the personal animus of these individuals against Complainant. Mr. Pakelder is a former boyfriend of Complainant who himself had to be warned to stay away from her during work hours during and after their then-recent breakup. In fact, the offensive content of the comments made by Walt VanderVeen was derived from his assumption that Complainant and Mr. Pakelder engaged in intimate sexual conduct. Mr. VanderVeen could also be portrayed as having hostile feelings toward Complainant. Her complaint resulted in his admonishment by management and the requirement that he attend what were derisively identified as "Lill" classes to improve his interactions with subordinates. As a final insult to his stature, Complainant was transferred to an assignment under another supervisor in order to separate her from him. The Commission has found that when a decision-maker acts on information provided by subordinates that is tainted by the retaliatory animus of those subordinates, a violation of the Act can be sustained even if the decision-maker did not independently harbor any of the same animus or know of the underlying circumstances motivating the subordinates. Rivera and Group W Cable, Inc., Ill. H.R.C. Rep. (1985CF1866, October 25, 1993).

Here, the decision-maker regarding the discharge of Complainant was Gerald Caveney, general counsel of Respondent. He was first apprised of the situation by Patricia Burke after the decision to require drug screening was made, and before the results of the testing was received.. However, Mr. Caveney decided that he "wanted to (and did) get a first hand account of exactly what Tammy (Shields) had heard." Tr. 297. Prior to making the decision to discharge

Complainant, Mr. Caveney reviewed the information he had received from Ms. Burke and Ms. Shields and determined that the admissions made by Complainant and Ms. Bundy required him to take that action as a matter of safety. The safety of the employees, protection of the company's property and the admissions made by the two women were the only factors that motivated the decision to discharge Complainant. Mr. Caveney credibly testified that he did not know Complainant, Ms. Bundy or Ms. Shields prior to October 13, 1998 and that he was not aware of the prior friction between Complainant and Mr. VanderVeen. When a decision-maker undertakes an independent investigation of the facts alleged by a subordinate regarding a potential adverse action against the subject employee, the alleged tainted motivation of the subordinate will not be imputed to the ultimate action taken by that decision-maker. Rice and Illinois Department of Children and Family Services, Ill. H.R.C. Rep. (1994SF0547, August 17, 2000). Complainant has failed to establish by a preponderance of the evidence that the decision to discharge her from employment with Respondent was pretextual in that it was based on information tainted with retaliatory animus on the part of the decision-maker's subordinates. It is recommended that the complaint be dismissed with prejudice.

Recommendation

It is recommended that the complaint and underlying charge in this matter be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

ENTERED: BY: _____
DAVID J. BRENT
ADMINISTRATIVE LAW JUDGE
March 12, 2003 ADMINISTRATIVE LAW SECTION

Service List for Lill #11115 as of 3/12/03:

Linda Ochsenfeld
William J. Borah & Associates
2024 Hickory Road
Suite 105
Homewood, Illinois 60430

Michael A. Warner
Susan F. Gallagher
Seyfarth Shaw
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603

Office of the General Counsel
Illinois Department of Human Rights
100 West Randolph Street
Suite 10-100
Chicago, Illinois 60601